

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5687 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

BAKHAR HAROON BHAYA

Versus

STATE OF GUJARAT

Appearance:

MR KR JANI for Petitioner

MR KC SHAH, AGP, for the respondents

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 12/09/96

ORAL JUDGEMENT

1. By way of this petition under Article 226 of the Constitution of India the petitioner - detenu - Bakhar Haroon Bhaya has brought under challenge the detention order dated 21st November 1992 rendered by the second respondent under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "COFEPOSA").

2. It is not in dispute that although the order of detention was passed on 21.12.1992 the petitioner came to be served with the order of detention and actually detained on 18.9.1995. It is also not in dispute that no declaration u/s.9(1) of the COFEPOSA has been made. Hence according to the submission of the learned Advocate for the petitioner the statutory period of detention would expire on 17th September, 1996, that is to say, after about five days from now.

3. Along with the detention order the grounds of detention were served to the petitioner. They, in substance, would read as under :

Acting on a specific information, customs

Officers of Jamnagar Division during the course of their sea patrolling on the night of 17/18.12.91 noticed one mechanical fishing boat moving in a suspicious manner near Kalubhar Island off the coast of Salaya and they intercepted the same. During the course of interrogation, it was ascertained from the tindel of the boat Hasam Abdulla Bhaya that the name of fishing boat was MFB Hanfi. Including the petitioner, there were five other persons and other crew members on the boat. On further enquiry, it was revealed that contraband silver slabs were brought from Dibha (Khorfkhan) which were lying in the two cargo holds of the said boat duly packed in gunny packs. The said boat was, therefore, brought Navabandar (Jamnagar) and on searching the same, 150 silver slabs, totally weighing 5516.400 kgs. and valued at Rs.4,26,41,772/- were recovered from two cargo holds. The same were seized by the Customs Officer under the Customs Act, 1962 under proper panchnama and on reasonable belief that the said silver slabs are smuggled and are liable to confiscation under the Customs Act. Thereafter, the statements of the detenu and other persons were recorded and the detenu and other five persons were remanded to judicial custody. In view of the statements and the facts and circumstances of the case and the material placed before the detaining authority, the detenu had gone to Dubai with clear intention of smuggling contraband silver into India. The detenu's associate received the said silver from one Pakistani national at dubai at the instance of Haji Abdulla Jusab Bhaya @ Yusuf Patel and brought the same into India by way of smuggling.

In view of the material, the detaining Authority was satisfied that the detenu was involved in smuggling goods and also inferred that the detenu would continue his prejudicial activity in case his movements are free. Based on these grounds, the order of detention was passed.

Along with the grounds of detention the detenu was also supplied with a complete set of documents considered by the Detaining Authority and relevant for the purpose of passing of the order, with a view to enable the detenu to make effective representation in view of the provision of Article 22(5) of the Constitution of India.

4. The legality and validity of the order of detention as also continued detention has been subjected to challenge on number of grounds, but it would not be necessary to deal with the same as this petition would succeed on one of the grounds mentioned hereunder. Mr.Kiran Jani, learned Advocate for the petitioner submitted that the constitutional right of the petitioner to make an effective representation guaranteed under Article 22(5) of the Constitution is violated inasmuch as some of the documents supplied to the detenu to enable him to make effective representation are not legible. Mr.Jani learned Advocate further submitted that in view of the fact that such documents are not legible the detenu could not make effective representation against the impugned order of detention and, therefore, the petitioner's continued detention has been rendered illegal. In order to make good this submission Mr.Jani demonstrated the documents appearing at Pages : 857, 859, 1201-A, 1229, 1267 and 1269. Mr. Jani submitted that the documents are partly legible and partly illegible and in view of the illegible part it would be very difficult to make out and understand as to what that part of the document would convey making it impossible for the petitioner to make effective representation on the basis thereof. The submission, therefore, is that the continued detention of the petitioner is rendered illegal.

5. Mr.K.C.Shah, learned A.G.P. appearing for the respondents perused the said documents and submitted that the document appearing at page 1229 would be legible but he fairly submitted that rest of the aforesaid pages of the document could not be said to be wholly legible. It is in this background that the Affidavit in Reply filed on behalf of the respondents will have to be evaluated. It has been stated in the Affidavit that the petitioner

did demand legible copies of the documents by saying that the documents supplied with the grounds were not legible. However, it was the stand of the concerned Authority of the respondent that the detenu ought to have specified all those documents and not merely some pages, viz. Page No.857, 1201-A and 1229. Although in the opinion of the authority the said pages could not be said to be illegible, fresh pages of such documents were supplied in reply to the representation. It is admitted that the petitioner had not made any representation against the detention order till upto 9.5.1996 and was required to make only oral representation before the Advisory Board, where he neither demanded legible documents nor made grievance about the illegible documents.

6. I have heard the learned A.G.P. for the respondents in this respect. His submission is that the petitioner's right to make effective representation is not violated. However, he has no answer to the fact that similar set of documents supplied to the co-detenu was required to be considered in another petition by a Division Bench of this Court (Coram : S.D.Dave & S.M.Soni, JJ., Per : Soni,J.) in Special Criminal Application No.799 of 1993, which was filed by co-detenu Daud Musa Manek. In its Judgment dated 30.12.1993, in the same set of facts and in the same set of ground of challenge to the very impugned order of detention the Division Bench had an occasion to observe as under :

"We have ourselves perused the said documents at Page 1201-A as well as the documents at pages 857 and 1229. In our opinion, they cannot be read even with difficulty. Parts of the said documents are illegible. As the parts of the said documents are illegible, the whole document can not be said to have been communicated to the detenu. As parts of the said documents are not legible, the constitutional right of the detenu guaranteed under Article 22(5) of the Constitution of India is violated and has rendered the continued detention illegal."

7. Mr.Kiran Jani, learned Advocate appearing for the petitioner has also made reference to another Bench decision of this Court in Iqbal Abdulkarim Dudhwala V/s. The State of Gujarat & ors., reported in 1992 Cr.Law Report (Gujarat) 545. In my opinion what has been said by the Division Bench in Para : 8 of the Report would provide a clear answer to what has been submitted on behalf of the respondents here also. Para : 8 reads :

"8. Now combating the submissions of the learned Addl. Public Prosecutor, namely "that merely because certain copies of the documents were either blank/illegible, the same did not violate the right of the detenu to make effective representation under Article 22(5) of the Constitution of India as the contents of the same were already known to the detenu", Mr. Sanjanwala submitted that the same was devoid of any merits and deserves to be straight way negatived as the same has been expressly dealt with and squarely covered by the decision of Supreme Court rendered in the case of M. Ahmedkutty Vs. Union of India and another, reported in (1990) 2, S.C.C. 1. In Para - 20 of the said decision, it has been held as under :

It is immaterial whether the detenu already knew about their contents or not. In mehrunnisa Vs. State of Maharashtra, (1981) 2 SCC, 709, it was held that the fact that the detenu was aware of the contents of the document not furnished was immaterial and non furnishing of the copy of the seizure list was held to be fatal. To appreciate this point, one has to bear in mind that the detenu is in jail and has no access to his own documents. In Mohd. Zakir vs. Delhi Administration, (1982) 3, SCC 216, it was reiterated that it being a constitutional imperative for the detaining authority to give the documents relied on and referred to in the order of detention, pari passu the grounds of detention, those should be furnished at the earliest so that the detenu could make an effective representation immediately instead of waiting for the documents to be supplied with. The question of demanding the documents was wholly irrelevant and infirmity in that regard was violative of constitutional safe guards enshrined in Article 22(5)."

This decision of the Supreme Court indeed squarely answers and negatives the submissions made by the learned A.P.P. and accordingly it must be held that it is immaterial whether the detenu already knew about the contents of the said partly blank/illegible copies of documents

or not. Further, the question of demanding the legible copies of the documents also pales into insignificance being wholly irrelevant as the infirmity in said regard was violative of Article 22(5) of the Constitution of India. In this view of the matter, this petition deserves to be allowed."

What has been said by both the aforesaid Benches would clearly provide an answer to the decision in Union of India V/s. Mohammed Ahmed Ibrahim, reported in A.I.R. 1992 SC 778 inasmuch as the earlier Division Bench (in Special Criminal Application No.799 of 1993) had an occasion to evaluate the same set of illegible documents qua the right of detenu in making effective representation.

8. The result is that the continued detention of the petitioner shall have to be held as illegal. The petition is, therefore, allowed. The continued detention of the petitioner - detenu - Bakhar Haroon Bhaya is hereby quashed and set aside. The petitioner - detenu - Bakhar Haroon Bhaya is hereby directed to be set at liberty forthwith if not required in any other case/proceeding. Rule made absolute accordingly.

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